

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

\* \* \*

GUSTAVO HERNANDEZ,

Plaintiff,

Case No. 3:22-CV-00212-ART-CLB

v.

JASMIN SPELLS, *et. al.*,

## Defendants.

## REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE<sup>1</sup>

Before the Court is Plaintiff Gustavo Hernandez's ("Hernandez"), application to proceed *in forma pauperis* (ECF No. 7), and proposed amended complaint, (ECF No. 7-1).<sup>2</sup> For the reasons stated below, the Court recommends that Hernandez's *in forma pauperis* application, (ECF No. 1), be denied as moot, and his proposed amended complaint (ECF No. 7-1), be dismissed without prejudice and without leave to amend.

## I. *IN FORMA PAUPERIS* APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

111

1 This Report and Recommendation is made to the Honorable Anne R. Traum,  
United States District Judge. The action was referred to the undersigned Magistrate  
Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

<sup>2</sup> Hernandez initiated this action by filing a proposed complaint, (ECF No. 1-1), but before the Court could screen that complaint, he filed his proposed amended complaint, (ECF No. 7-1), which the Court finds is the operative pleading in this action.

1                   Pursuant to the LSR 1-1: “Any person who is unable to prepay the fees in a civil  
 2 case may apply to the court for authority to proceed [IFP]. The application must be made  
 3 on the form provided by the court and must include a financial affidavit disclosing the  
 4 applicant’s income, assets, expenses, and liabilities.”

5                    “[T]he supporting affidavit [must] state the facts as to [the] affiant’s poverty with  
 6 some particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th  
 7 Cir. 1981) (quotation marks and citation omitted). A litigant need not “be absolutely  
 8 destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*,  
 9 335 U.S. 331, 339 (1948).

10                  A review of the application to proceed IFP reveals Hernandez can pay the filing  
 11 fee. (See ECF No. 7 at 4.) However, because the Court recommends that this case be  
 12 dismissed without prejudice and without leave to amend, the Court also recommends that  
 13 Hernandez not be assessed the filing fee and the motion be denied as moot.

14                  **II. SCREENING STANDARD**

15                  Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A  
 16 provides, in relevant part, that “the court shall dismiss the case at any time if the court  
 17 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a  
 18 claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant  
 19 who is immune from such relief.” 28 U.S.C. § 1915A(b). A complaint is frivolous when  
 20 “it lacks an arguable basis in either law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325  
 21 (1989). This includes claims based on legal conclusions that are untenable (e.g., claims  
 22 against defendants who are immune from suit or claims of infringement of a legal interest  
 23 which clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,  
 24 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th  
 25 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same  
 26 standard applied in the context of a motion to dismiss under Federal Rule of Civil  
 27 Procedure 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which  
 28 requires dismissal where the complaint fails to “state a claim for relief that is plausible on

1 its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

2 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*  
 3 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must  
 4 accept as true all well-pled factual allegations, set aside legal conclusions, and verify  
 5 that the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S.  
 6 662, 679 (2009). The complaint need not contain detailed factual allegations, but must  
 7 offer more than “a formulaic recitation of the elements of a cause of action” and “raise a  
 8 right to relief above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is  
 9 taken in reviewing the pleadings of a *pro se* party, for a more forgiving standard applies  
 10 to litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).  
 11 Still, a liberal construction may not be used to supply an essential element of the claim  
 12 not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is  
 13 appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice  
 14 of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v.*  
 15 *United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

16 **III. SCREENING OF COMPLAINT**

17 In his complaint, Hernandez sues Defendants Deputy Public Defender Jasmin  
 18 Spells, District Court Judge Kerry Earley, Deputy District Attorney John Niman, District  
 19 Court Judge Jacqueline Bluth, and Deputy District Attorney Maria Lavelle (collectively  
 20 referred to as “Defendants”) under 42 U.S.C. § 1983. (See ECF No. 7-1.) Hernandez’s  
 21 amended complaint alleges that the Defendants conspired to deprive Hernandez of his  
 22 constitutional right to due process by refusing to afford him his right to self-representation  
 23 and Defendants also conspired to “convict” Hernandez. (ECF No. 7-1 at 2.) Hernandez  
 24 asserts two counts, which all relate to his underlying criminal case and conviction. (*Id.* at  
 25 3-6.) Hernandez requests monetary damages. (*Id.* at 8.)

26 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority  
 27 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d  
 28 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir.

1 2000)). The statute “provides a federal cause of action against any person who, acting  
 2 under color of state law, deprives another of his federal rights[,]” *Conn v. Gabbert*, 526  
 3 U.S. 286, 290 (1999), and is “merely . . . the procedural device for enforcing substantive  
 4 provisions of the Constitution and federal statutes.” *Crumpton v. Gates*, 947 F.2d 1418,  
 5 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the violation  
 6 of a federally-protected right by (2) a person or official who acts under the color of state  
 7 law. *Anderson*, 451 F.3d at 1067.

8         However, § 1983 is not a backdoor through which a federal court may overturn a  
 9 state court conviction or award relief related to the fact or duration of a sentence. Section  
 10 1983 and “the federal habeas corpus statute . . . both provide access to the federal courts  
 11 ‘for claims of unconstitutional treatment at the hands of state officials, . . . [but] they  
 12 different in their scope and operation.’” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir.  
 13 2003) (quoting *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take  
 14 care to prevent prisoners from relying on § 1983 to subvert the differing procedural  
 15 requirements of *habeas corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at  
 16 486-87; *Simpson v. Thomas*, 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner  
 17 challenges the legality or duration of his custody, raises a constitutional challenge which  
 18 could entitle him to an earlier release, or seeks damages for purported deficiencies in his  
 19 state court criminal case, which effected a conviction or lengthier sentence, his sole  
 20 federal remedy is a writ of *habeas corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997);  
 21 *Heck*, 512 U.S. at 481; *Wolf v. McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v.*  
 22 *Rodriguez*, 411 U.S. 475 (1973); *Simpson*, 528 F.3d at 692-93. Stated differently, where  
 23 “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction  
 24 or sentence,” then “the complaint must be dismissed unless the plaintiff can demonstrate  
 25 that the conviction or sentence has already been invalidated.” *Heck*, 512 U.S. at 487.

26         It appears that Hernandez is challenging the constitutionality of his state court  
 27 criminal conviction. Consequently, he must demonstrate that his conviction has been  
 28 overturned to proceed in an action under § 1983. As he has not done so, his sole relief is

1 a *habeas corpus* action. The Court, therefore, recommends that the complaint be  
2 dismissed without prejudice and without leave to amend.

3 **IV. CONCLUSION**

4 For good cause appearing and for the reasons stated above, the Court  
5 recommends that Hernandez's application to proceed *in forma pauperis*, (ECF No. 7), be  
6 denied as moot, and his complaint, (ECF No. 7-1), be dismissed without prejudice and  
7 without leave to amend.

8 The parties are advised:

9 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of  
10 Practice, the parties may file specific written objections to this Report and  
11 Recommendation within fourteen days of receipt. These objections should be entitled  
12 "Objections to Magistrate Judge's Report and Recommendation" and should be  
13 accompanied by points and authorities for consideration by the District Court.

14 2. This Report and Recommendation is not an appealable order and any  
15 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the  
16 District Court's judgment.

17 **V. RECOMMENDATION**

18 **IT IS THEREFORE RECOMMENDED** that Hernandez's application to proceed *in*  
19 *forma pauperis*, (ECF No. 7), be **DENIED AS MOOT**;

20 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the amended complaint,  
21 (ECF No. 7-1); and,

22 **IT IS FURTHER RECOMMENDED** that Hernandez's amended complaint, (ECF  
23 No. 7-1), be **DISMISSED WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND**.

24  
25 **DATED:** July 15, 2022.

26  
27   
28 **UNITED STATES MAGISTRATE JUDGE**